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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-6289

INEZ MOORE,

Appellant,

v.

CITY OF EAST CLEVELAND, OHIO,

Appellee.

ON APPEAL FROM A JUDGMENT OF
THE SUPREME COURT OF OHIO

BRIEF FOR THE APPELLANT

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ON APPEAL FROM A JUDGMENT OF
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BRIEF FOR THE APPELLANT

OPINIONS BELOW

Following an appeal from the East Cleveland Municipal Court, the Court of Appeals of Ohio, Eighth Judicial District affirmed the judgment of the Municipal Court in a written opinion. That opinion is unreported but is reproduced in the Appendix (A-7).

The Supreme Court of Ohio dismissed the Appellant's appeal to that court, holding that no substantial constitutional question was presented. The judgment of the Supreme Court was not accompanied by an opinion.

JURISDICTION

The decision and final judgment of the Supreme Court of Ohio was filed on November 28, 1975. Notice of appeal was filed in the Supreme Court of Ohio on February 20, 1976. This case was docketed on February 26, 1976. Leave to appeal in forma pauperis was granted and probable jurisdiction was noted on April 26, 1976. The jurisdiction of this Court is conferred by 28 U.S.C. §1257(2).

ORDINANCES INVOLVED

The relevant East Cleveland Municipal ordinances are as follows:

"1341.08 FAMILY.

'Family' means a number of individuals related to the nominal head of the household or to the spouse of the nominal head of the household living as a single housekeeping unit in a single dwelling unit, but limited to the following:

(a) husband or wife of the nominal head of the household.

(b) unmarried children of the nominal head of the household or of the spouse of the nominal head of the household, provided, however, that such unmarried children have no children residing with them.

(c) father or mother of the nominal head of the household or of the spouse of the nominal head of the household.

(d) notwithstanding the provisions of subsections (b) hereof, a family may include not more than one dependent married or unmarried child of

the nominal head of the household or of the spouse of the nominal head of the household and the spouse and dependent children of such dependent child. For the purpose of this subsection, a dependent person is one who has more than fifty percent of his total support furnished for him by the nominal head of the household and the spouse of the nominal head of the household.

(e) a family may consist of one individual."

"1351.02 LIMITATION ON OCCUPANCY.

The occupancy of any dwelling unit shall be limited to one, and only one, family and to any authorized persons occupying such dwelling unit with such family."

"1351.03 HABITABLE FLOOR AREA.

Every dwelling unit shall conform to the following standards:

* * *

(b) Every dwelling unit shall have not less than 250 square feet of habitable floor area and shall contain at least one room which shall have not less than 150 square feet of habitable floor area and which is not less than ten feet in width; provided further that no room used to compute compliance with such 250 square foot minimum limitation shall be less than seventy square feet of habitable floor area.

* * *

(e) Every dwelling unit shall contain at least 150 square feet of habitable floor area for the first occupant thereof and at least 100 additional square feet of habitable floor area for every additional occupant thereof, but in no case shall any dwelling unit contain less than 250 square feet of habitable floor area."

* * *

QUESTION PRESENTED

Whether the City of East Cleveland may, through its zoning ordinances, constitutionally define "family" so narrowly as to preclude many blood relatives from living together as a single family unit, even to the extent of precluding a grandmother from living with and raising her grandson.

STATEMENT OF THE CASE

The Appellant Inez Moore is a homeowner in the municipality of East Cleveland, Ohio. She is the paternal grandmother of John Moore, Jr., presently age 10, and has raised her grandson in her own home since the death of the child's mother in 1967, when John Jr. was less than a year old. Also present in the home is John Jr.'s father, John Moore, Sr. and Mrs. Moore's other son Dale Moore and Dale's son, Dale Jr. (A-5).

Sometime after John Jr. enrolled in the East Cleveland Public Schools, Mrs. Moore's home was inspected by an East Cleveland Municipal Housing Inspector. On January 16, 1973 a notice was issued by Deputy Housing Inspector Raiford Williams informing Mrs. Moore that she was in violation of East Cleveland Ordinance §1351.02 which states that the occupancy of a dwelling unit shall be limited to one, and only one family. The notice specified that "John Moore, Jr. (7) is an illegal occupant of suite 1854." (A-8)

This allegation was occasioned by the definition of "family" in §1341.08 of the East Cleveland zoning ordinances. That section strictly regulates the kinds of family members that may live together. The ordinance

designates one person as "nominal head of the household", normally the homeowner. The husband or wife of the homeowner and their unmarried children may occupy a home under this ordinance. However, only one of the homeowner's parents may live in the house; brothers and sisters, nieces and nephews, and uncles and aunts of the homeowner are not defined as part of the family and may not live in the home. In addition, the homeowner may allow not more than one of his/her children to bring grandchildren into the home. It was this aspect of the ordinance which Mrs. Moore offended when she allowed her grandson John Jr. to live in her home when another grandchild by a second son was also living there.

On April 3, 1974 Mrs. Moore was charged criminally with "unlawfully permit[ting] two families to occupy a single family dwelling unit." (A-2) Certain stipulations of fact were received by the trial court confirming the composition of the Moore family and the defendant filed a motion to dismiss on the ground that the ordinance was unconstitutional. (A-3) This motion was overruled on May 17, 1974 and the defendant was found guilty. The trial court fined Mrs. Moore $25.00 and sentenced her to five days in jail for her crime. (A-1)

An appeal was perfected to the Court of Appeals of Ohio for the Eighth Judicial District. That court affirmed the judgment of the trial court in an opinion issued on July 18, 1975 (A-7); Presiding Judge Jack G. Day filed a dissenting opinion. (A-14) The Defendant-Appellant filed an appeal in the Ohio Supreme Court; that Court dismissed the appeal without opinion for want of a substantial constitutional question. (A-19)

A notice of appeal was filed from the judgment of the Ohio Supreme Court (A-20) and on April 20, 1976 this Court noted probable jurisdiction.

SUMMARY OF ARGUMENT

The family has long been afforded protection in the law, not only at the insistence of state legislatures and the state judiciary, but also in an unbroken line of United States Supreme Court decisions. The elevated status of the family is based upon the fundamental rights of privacy and freedom of association as enunciated in the decisions of this Court, and more particularly includes the right of a parent to control the upbringing of his children and the right of family members to establish a home together in a manner best suited to their individual and collective needs. The law too recognizes that the family has always been a flexible institution in our society, an institution which frequently incorporates grandchildren, elderly aunts, nieces and nephews; the decisions have not drawn a circle around the principles of privacy and freedom of association so tightly as to "zone out" the family that departs from the husband-wife-child pattern.

This East Cleveland ordinance directly and substantially interferes with these fundamental rights in that it tells a grandmother that she cannot raise her grandson in her own home and it tells a father that he cannot decide that his child's best interests require him to maintain the maternal relationship between his son and the child's grandmother. This same ordinance ventures even further to tell many common groupings of blood relatives (for example the married woman who

returns to live with her parents while her husband serves in the armed forces) that they cannot make that very personal and private decision to live together as one household in East Cleveland, Ohio.

A criminally enforceable ordinance which slices so deeply into family relationships and which banishes from a community many true families, is overbroad and there exists no compelling governmental interest to support it. Similarly, in equal protection terms, an ordinance which prevents ten year old grandsons from living with their grandmothers is subject to the most rigorous judicial scrutiny. The justifications tendered by the City for the ordinance, such as density control, traffic control and ease of enforcement, are not of that quality of interests which this court has previously denoted as compelling and are in fact substantially less important than such interests. Moreover, there are many other, less offensive, methods by which East Cleveland can accomplish its objectives; indeed one of its objectives, the control of population density, has already been met in a variety of ways including the adoption of an ordinance placing a per person occupancy limit on each dwelling unit in the city.

Even if the presence of protected family interests does not require a stricter standard of review, the more relaxed standard of review dictated by this Court in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) is more than this classification can withstand. Taking each purported justification individually, those interests which can be considered "legitimate" are hardly furthered by this ordinance. Thus the control of population density is merely duplicative of other ordinance sections and the control of automobile traffic is scarcely furthered by relocating young children

outside the city limits. Each justification fails under analysis and the entire classification fails to meet the fair and substantial relation standard of *Village of Belle Terre.*

ARGUMENT

I.

INTRODUCTION.

The East Cleveland ordinance at issue in this case is at war with traditional concepts of the family, arbitrarily classifying a single family as "two" and criminally punishing the head of the household for permitting such a family relationship to endure. The definition of the family as adopted by the City of East Cleveland excludes from its dwelling units many common family groupings such as (1) the adult brother and sister, as yet unmarried, who choose to reside together; (2) the married woman who rejoins her parents while her husband is in the armed forces; (3) a married couple who take in and raise an orphaned niece or nephew; (4) the grandmother who raises the children of her deceased daughter; (5) the married couple and their children who provide a familial sanctuary for their immigrant uncle; (6) two elderly sisters whose spouses have passed away.

A. The Family As a Social Institution.

The family is the most deeply rooted of all society's institutions. "The Human family constitutes the beginning and the essential element of society." St.

Augustine, *The City of God,* Book XIX, Chapter XVI. It is an institution that predates, and very likely will antedate, other legal and social institutions, such as the municipality, which we have come to accept.

> As far back as our knowledge takes us, human beings have lived in families. We know of no period when this was not so. We know of no people who have succeeded for long in dissolving the family or displacing it. Instead, men have exercised their imagination in the elaboration of different styles of family living and different ways of relating to the larger community. Mead & Heyman, *The Family* (1965).

Sociologists commonly define families as persons related by name, age or ancestry, who live in the same household;[1] families are then further classified as "nuclear" or "extended." The nuclear family is confined to husband, wife and children, with no other members present. The extended family includes other relatives or in-laws of the family head, sharing the same household living arrangements with the nuclear members.[2] The balance between the extended family and the nuclear family has shifted over time and the extended family is not as common today as it was in the nineteenth century. While today the nuclear family is evidently the "prevailing" pattern among middle class Americans,[3] the extended family remains a vital part of present day living patterns and plays a special role among certain subcultures within our population.

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[1] Billingsley, *Black Families in White America,* p. 16 (1968).

[2] *Id.*

[3] Zanden, *Sociology: A Systematic Approach,* p. 320 (1965).

The extended family has many strengths which are not present in the nuclear family. Dorothy B. Blitstein writes:

> The case histories behind mounting rates of delinquency, addiction, crime, neurotic disabilities, mental illness and senility in societies in which autonomous nuclear families prevail suggest that frequent failure to develop enduring family ties is a serious inadequacy for both individuals and societies." Blitstein, *The World of the Family*, 256 (1963).

Extended families provide services and emotional support seldom found in the nuclear family:

> the troubles of the nuclear family in industrial societies generally, and in American society, particularly, stem largely from the inability of this type of family structure to provide certain of the services performed in the past by the extended family. Adequate health, education, and welfare provision, particularly for the two non-productive generations in modern societies, the young and the old, is increasingly an insurmountable problem for the nuclear family. The unrelieved and sometimes unbearably intense parent-child relationship, where child-bearing is not shared at least in part by others, and the loneliness of nuclear family units, increasingly turned in on themselves in contracted and relatively isolated settings, is another major problem.[4]

In times of crisis, the American family has traditionally reorganized itself into a more extended family pattern to accommodate the needs of its members. An English visitor to the United States wrote in 1848:

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[4] Yorburg, *The Changing Family*, p. 194 (1973).

> Our blessed custom they have in America resulting from the abundance which they enjoy; a man dies, his widow and children are objects of peculiar care to the surviving branches of his family; the mother dies, her orphans find a home among her friends and relatives.[5]

This practice of expanding the home to assist relatives has continued to be an accepted tenet of our society.[6] Among all segments of modern American society, and especially within families which lean toward traditional religious values, kinship ties are relied on to provide a home for emotionally needy or otherwise needy relatives.[7]

The extended family is of particular importance to elderly persons. It is recognized that the elderly need to maintain strong family ties to effectively cope with life as they grow older.[8] A sample obtained by the United

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[5] Calhoun, *A Social History of the American Family*, p. 23 (1945).

[6] Kosa, Rachiele and Schommer, *Sharing the Home With Relatives*, Marriage and Family Living, p. 129 (May, 1960).

[7] *Id.*

[8] Report of the White House Conference on Aging, pp. 225, 227, (1961). According to Dr. Charles Palm, regional commissioner for mental health and medical programs in Pennsylvania, "besides poverty, the major psychological problems of being old are that many times you're lonely, you don't have many friends left and you don't have anything to do. . . . When an older person is around his family and loved ones, senility takes longer to occur, because the elderly person is forced to use his mind more. Also, grandchildren and grandparents can be a great source of mutual emotional security." Anderson, *The Pains and Pleasures of Old Black Folks*, Ebony, pp. 128-130. (March, 1973).

States Census Bureau in 1952 revealed that among elderly people (65 years and older) one fourth of the married couples, almost one-third of the widowed, single, divorced and separated males, and almost half of the widowed, single, divorced and separated females lived with their children.[9] With the rapid increase in the percentage of elderly persons in our society, the prevalence of the extended family can be expected to increase.[10]

Among subgroups within our society, the extended family is more common among the very affluent and the very poor.[11] Black families and white ethnic families frequently tend to be extended families.[12]

> Within the black lower-class it has been quite common for several generations, or parts of the kin, to live together under one roof. Often a maternal grandmother is the acknowledged head of this type of household which has given rise to the term "matrifocal" to describe lower-class black family patterns. Scanzoni, *The Black Family in Modern Society*, p. 134 (1971).

There is a much greater tendency for black families than white families to take in young related children. In husband-wife families without children, only 3% of white families compared to 13% of black families take

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[9]Donahue and Tibbits (ed.), *The New Frontiers of Aging*, pp. 161-62 (1957). See also Caven, *Family Life and Family Substitutes in Old Age*, American Sociological Review, pp. 71-83 (February, 1949).

[10]See Atchley, *The Social Forces in Later Life*, p. 9 (1972).

[11]Yorburg, *The Changing Family*, p. 108 (1973).

[12]Novak, *The Rise of the Unmeltable Ethnics*, p. 300 (1973).

in relations under age 18. In families headed by a woman, black families demonstrate an even greater tendency to absorb other related children (41% as compared with 7% in similarly situated white families). Families headed by elderly black women take in the highest proportion of related children, a figure of 48%.[13] The role of the grandmother in the black family is obviously of extreme significance. In discussing the black family, Joyce Ladner states:

> Grandmothers often live in the homes of their children and grandchildren. Here they probably exercise more influence over the behavior of the child than do the parents because of their continuous involvement with them. They not only take care of them in the absence of the parents but the process continues even when the parents return home.[14]

B. The Family in the Law.

The institution of the family has historically been accorded considerable protection in the law, reflecting its primary role in society. This protection can be seen in judicial efforts to guard families against undue state interference in their internal functioning, as well as in the deference the courts have given to legislative attempts to support the institution of the family.

This Court has long deemed the rights to establish a home, to control the upbringing of children and to family life in general to be of fundamental importance

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[13]Hill, *Strengths of the Black Family*, p. 5 (1971).

[14]Ladner, *Tomorrow's Tomorrow*, p. 61 (1972).

in our constitutional scheme, despite the absence of express language in the Bill of Rights. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). See also *Prince v. Massachusetts*, 321 U.S. 158 (1944). In addition this Court has also consistently acknowledged the propriety of state legislation to protect the family, particularly the marriage relationship. *See, Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1877); *Simms v. Simms*, 175 U.S. 162, 167 (1899); *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Sosna v. Iowa*, 419 U.S. 393 (1975). See also *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

Legislative concepts of family have often incorporated an understanding of the role in which the broader family (the non-nuclear or extended family) plays in American life. Congress has recognized this reality in the Social Security Act[15] and in the Internal

[15]42 U.S.C. §601

For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part.

* * *

42 U.S.C. §606

When used in this part –

(a) The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or

(continued)

Revenue Code.[16] State laws of descent and distribution

(footnote continued from preceding page)

physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, ...

[16]26 U.S.C. §152

(a) General definition. For purposes of this subtitle, the term "dependent" means any of the following individuals over half of whose support, for the calendar year in which the taxable year of the taxpayer begins, was received from the taxpayer (or is treated under subsection (c) or (e) as received from the taxpayer):

(1) A son or daughter of the taxpayer, or a descendant of either,
(2) A stepson or stepdaughter of the taxpayer,
(3) A brother, sister, stepbrother, or stepsister of the taxpayer,
(4) The father or mother of the taxpayer, or an ancestor of either,
(5) A stepfather or stepmother of the taxpayer,
(6) A son or daughter or a brother or sister of the taxpayer,
(7) A brother or sister of the father or mother of the taxpayer,
(8) A son-in-law, daughter-in-law, father-in-law, mother-in-law, brother-in-law, or sister-in-law of the taxpayer,
(9) An individual (other than an individual who at any time during the taxable year was the spouse, determined without regard to section 153, of the taxpayer) who, for the taxable year of the taxpayer, has as his principal place of abode the home of the taxpayer and is a member of the taxpayer's household, or
(10) An individual who –
  (A) is a descendent of a brother or sister of the father or mother of the taxpayer,
  (B) for the taxable year of the taxpayer receives institutional care required by reason of a physical or mental disability, and
  (C) before receiving such institutional care, was a member of the same household as the taxpayer.

reflect, in part, this same understanding.[17] The judiciary too has consistently deferred to natural blood relationships in the contexts of child custody and guardianship proceedings.[18]

[17]See, for example, Ohio Revised Code §2105.06.

Several states have enacted relative responsibility laws which impose legal obligations of support on certain relatives (e.g., in some states an individual may be obligated to support his parents, grandparents, brothers and sisters). See Farber, *Family and Kinship in Modern Society*, p. 69 (1973).

[18]In custody hearings, where the parents are not eligible for consideration, the courts have generally favored lineal ascendants or other blood relatives. *Tillman v. Walter*, 21 Ala. App. 241, 108 So. 61, *cert. denied* 214 Ala. 76, 108 So. 67 (1925); *In Re Hauser*, 189 N.Y.S. 51 (Sur. Ct. 1921); *In Re Zimdal*, 190 App. Div. 54, 179 N.Y.S. 380 (1919); *Commonwealth ex rel. Bradley v. Bradley*, 188 Pa. Super 108, 146 A.2d 147 (1958); *Commonwealth ex rel. v. Perna*, 74 Pa. D. & C. 1 (C.P. Berks Co. 1950); *Parker v. Lewis*, 45 Okla. 807, 147 P. 310 (1915). Frequently courts give priority to the grandparents in custody contests thereby preserving the family unity. *Zook v. Spannaus*, 34 Ill. 2d 612, 217 N.E. 2d 789 (1966); *McLain v. Short*, 144 Ark. 600, 244 S.W. 428 (1920); *Shope v. Singleton*, 196 Ga. 506, 27 S.E. 2d 26 (1943). In Ohio see *In Re Haynes*, 62 Ohio App. 289, 23 N.E. 2d 956 (1939), awarding custody of a neglected child to a maternal aunt.

Similarly, close blood relatives are typically entitled to a preference in appointment as guardians for minors. See, e.g., *McLain v. Short, supra; Simmons v. Simmons*, 185 Ky. 449, 215 S.W. 86 (1919); *State ex rel. Michelson v. Superior Court of King County*, 41 Wash. 2d 718, 251 P. 2d 603 (1952). As to disputes among relatives, see 63 A.L.R. 3d 813. Such a preference (sometimes statutory, sometimes judicial) also exists for the appointment of close relatives as guardians for incompetent persons. 65 A.L.R. 3d 991.

As one might expect, the word "family" in the law is sometimes interpreted differently, depending on the context within which it is used.[19] Nevertheless the state courts have demonstrated a district pattern of defining the term "family," when possible, in an extended family sense so as to accommodate and protect the family configuration presented to them.[20] The law of zoning is no exception to this generalization. Zoning ordinances have traditionally either left the term "family" to definition by the Court (in which case it has uniformly been defined to include all blood

[19]See generally, *Norwegian Old Peoples' Home Society v. Wilson*, 176 Ill. 94, 52 N.E. 41, 43 (1898); *Spencer v. Spencer*, 11 Paige 159, 160 (N.Y. 1844); *Whelan v. Reilly*, 3 W. Va. 597, 610 (1869). In the context of wills, of course, the courts attempt to ascertain the meaning in which the testator employed the word.

[20]See the interpretation of homestead exemption laws [*Lobban v. Vander Vries Realty & Mortgage Co.*, 48 Ariz. 180, 60 P.2d 933 (1936); *In re Dittemore's Estate*, 152 Kan. 574, 106 P.2d 1056 (1940); *Brooks v. Collins*, 74 Ky. 622 (1876); *January v. Marler*, 274 Mo. 543, 203 S.W. 817 (1918); *Carle v. Bamberger*, 53 Okla. 777, 158 P. 599 (1916); *First Nat'l Bank v. Sokolski*, 62 Tex. Civ. App. 324, 131 S.W. 818 (1910); *Real Estate Land Title & Trust Co. v. Street*, 85 S.W. 2d 341 (Tex. Civ. App., 1935)]; insurance policies [*Hosmer v. Welch*, 107 Mich. 470, 67 N.W. 504 (1896); *LeRoux v. Edmundson*, 276 Minn. 120, 148 N.W. 2d 812 (1967); *Tomlyanovich v. Tomlyanovich*, 239 Minn. 250, 58 N.W. 2d 855 (1953)]; garnishment exemptions [*Jorboe v. Jorboe*, 106 Mo. App. 459, 79 S.W. 1162 (1904)]; workman's compensation statutes [*Holmberg v. Cleveland-Cliffs Iron Co.*, 219 Mich. 204, 189 N.W. 26 (1922)]; and widow's allowances [*In re Rash's Estate*, 256 S.W. 525 (Mo. Ct. App. 1923)].

relatives)[21] or have defined "family" in a manner similar to the definition reviewed by this Court in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974): "One or more persons related by blood, adoption or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants.[22]

Municipal zoning ordinances, designed to create geographical areas for family living and to achieve other social objectives, were upheld by this Court in the late 1920's against challenges based on substantive due process. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Nectow v. City of Cambridge*, 277 U.S. 183

[21]*See, e.g., Village of Riverside v. Reagan*, 270 Ill. App. 355 (1933). The zoning cases which interpret the term "family" uniformly assume that "family" includes blood relatives, extending family to include boarders, lodgers, servants and others who reside with the family. See, e.g., *Town of Henrietta v. Fairchild*, 53 Misc. 2d 862, 279 N.Y.S. 2d 992 (1967); *Carroll v. Arlington County*, 186 Va. 575, 44 S.E. 2d 6 (1947).

[22]A random survey by counsel of eighteen Greater Cleveland municipalities disclosed only one suburb (Lyndhurst) with an ordinance similar to East Cleveland's. One other suburb (Warrensville Heights) has an ordinance similar to the 1961 version of the East Cleveland ordinance; see n.38, *infra*. All the others are substantially identical to the "blood, marriage or adoption" ordinance at issue in *Village of Belle Terre*. The municipalities surveyed were Bay Village, Beachwood, Brookpark, Fairview Park, Garfield Heights, Lyndhurst, Maple Heights, Mayfield Heights, Middleburg Heights, North Olmstead, Olmstead Falls, Pepper Pike, Richmond Heights, Rocky River, Shaker Heights, South Euclid, Warrensville Heights, and Westlake.

Most of the cases which present questions about *unrelated* persons involve ordinances wherein family is defined in terms of those persons related by blood, marriage or adoption. See, e.g., *City of Des Plaines v. Trottner*, 34 Ill. 2d 432, 216 N.E. 2d 116 (1966); *City of Newark v. Johnson*, 70 N.J. Super. 381, 175 A.2d 500 (1961).

(1928). Subsequently a series of state court decisions interpreted the term "family" even more broadly than blood relatives, to include groups of unrelated individuals living together as functional families.[23] Then

[23]A number of these cases simply permitted non-related individuals to live in an area where family is broadly defined or where there is no definition of family. *Brady v. Superior Court*, 200 Cal. App. 2d 69, 19 Cal. Rptr. 242 (1962); *Neptune Park Ass'n. v. Steinberg*, 138 Conn. 357, 84 A.2d 687 (1951); *Oliver v. Zoning Commission of Town of Chester*, 31 Conn. Sup. 197, 326 A.2d 841 (1974); *County of Lake v. Gateway Houses Foundation, Inc.*, 19 Ill. App. 3d 318, 311 N.E. 2d 371 (1974); *Robertson v. Western Baptist Hospital*, 267 S.W. 2d 395 (Ky. 1954); *City of Takoma Park v. County Board of Appeals for Montgomery County*, 259 Md. 619, 270 A.2d 772 (Md. Ct. App. 1970); *Shuman v. Board of Aldermen of Newton*, 282 N.E. 2d 653 (Mass. 1972); *Stafford v. Incorporated Village of Sands Point*, 200 Misc. 57, 102 N.Y.S. 2d 910 (1951); *Application of LaPorte*, 2 App. Div. 2d 710 152 N.Y.S. 2d 916 (1956).

Other cases held ordinances to be unduly restrictive in their limitations on unrelated persons. *Village of University Heights v. Cleveland Jewish Orphans' Home*, 20 F.2d 743 (6th Cir. 1927), cert. denied, 275 U.S. 569; *Women's Kansas City St. Andrew's Society v. Kansas City, Mo.*, 58 F.2d 593 (8th Cir. 1932); *Timberlake v. Kenkel*, 369 F. Supp. 456 (E.D. Wisc. 1974); *City of Des Plaines v. Trottner*, 34 Ill. 2d 432, 216 N.E. 2d 116 (1966); *Kirsch Holding Co. v. Borough of Manasquan*, 59 N.J. 241, 281 A.2d 513 (1971); *Taxpayers' Ass'n of Weymouth Twp. Inc. v. Weymouth Twp.*, 125 N.J. Super. 376, 311 A.2d 187 (1973); *Gabe Collins Realty, Inc. v. City of Margate*, 112 N.J. Super. 341, 271 A.2d 430 (1970); *Marino v. Mayor and City Council of Norwood*, 77 N.J. Super. 587, 187 A.2d 217 (1963); *East House v. Riker*, 72 Misc. 2d 823, 339 N.Y.S. 2d 511 (Sup. Ct. 1973); *Jewish Consumption Relief Society v. Town of Woodbury*, 230 App. Div. 228 (1930).

See also *Boston Edison Protective Ass'n v. Paulist Fathers*, 306 Mich. 253, 10 N.W. 2d 847 (1943); *Carroll v. City of Miami Beach*, 198 So. 2d 643 (Fla. App. 1967). *Cf., Missionaries of La Sallette v. Whitefish Bay*, 267 Wis. 609, 66 N.W. 2d 627 (1954).

in 1974 this court in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) upheld the power of municipalities to limit the number of unrelated persons who could live together as a single "family," thereby reaffirming the authority of a local community to zone for protection of "family needs." 416 U.S. at 9.[24]

Belle Terre is a decision which builds on the concept of family as embodied in that village's ordinance, namely "persons related by blood, adoption or marriage, living and cooking together as a single housekeeping unit." It protects the right of a village which was composed solely of single family dwellings with a per person occupancy ratio of slightly over three persons per dwelling, to preclude a semi-transient[25] group of college students from turning a single family dwelling into what amounted to a lodging house. Had Belle Terre attempted to define families to exclude

[24]Compare *Young v. American Mini Theatres, Inc.*, ____ U.S. ____, 44 U.S.L.W. 4999 (1976) which upholds the authority of a city to regulate, via zoning, adult entertainment establishments, in part to protect family values.

Even after *Village of Belle Terre*, the lower courts have distinguished it to permit functional families to persist. See *O'Grady v. Town of North Castle*, 43 U.S.L.W. 2345 (S.D.N.Y. 1975); *White Plains v. Ferraioli*, 34 N.Y. 2d 300, 313 N.E. 2d 756 (1974); *Group House of Port Washington v. Board of Zoning Appeals*, 370 N.Y.S. 2d 433, 82 Misc. 2d 634 (Sup. Ct. 1975); *Moore v. Nowakowski*, 46 App. Div. 2d 996, 361 N.Y.S. 2d 795 (1974); *Little Neck Community Ass'n v. Working Organization for Retarded Children*, p. 10, col. 5, N.Y.L.J. (9/17/75), *aff'd* CCH Pov. L. Rprt. ¶22, 696 (May 3, 1976).

[25]None of the students were still living in Belle Terre when that case was heard. In contrast, the Moore family has remained intact (execution of the criminal sentence has been stayed) during the appeal of this case.

certain blood relatives, this Court would have been presented with a far different case. As the Village pointed out in its brief to the Court:

> The Village of Belle Terre did not define what a family is. Thousands of years of Western Civilization and every other civilization have done that. Whether it be the extended family of a more leisurely age or the nuclear family of today the role of the family in raising and training successive generations of the species makes it more important, we dare say, than any other social or legal institution - executives, legislatures, courts, corporations or student fraternities. If any freedom not specifically mentioned in the Bill of Rights enjoys a "preferred position" in the law it is most certainly the family. Appellants' Brief at 26.

II.

BY PRECLUDING APPELLANT AND HER SON AND GRANDSON FROM ESTABLISHING A HOME TOGETHER IN EAST CLEVELAND, THIS ORDINANCE UNCONSTITUTIONALLY INVADES THE FAMILY'S RIGHTS OF PRIVACY AND FREEDOM OF ASSOCIATION.

The fundamental rights to establish a home, to control the upbringing of children and to family life are established by the confluence of several interrelated constitutional doctrines principally within the concepts of freedom of association and the right to privacy.

By denying her the right to live with and raise her grandson, the East Cleveland ordinance in question invades Mrs. Moore's constitutional rights to privacy

and freedom of association in two ways: it invades her privacy, and that of her son, in making parental decisions concerning the upbringing of her grandson; and it denies her, and the rest of her family, the right to establish a home together.

A. The Ordinance Invades the Privacy of Family Decisions Concerning the Nurturing of Children.

Parental decisions about the upbringing of children have always been protected by our Constitution. In *Prince v. Massachusetts,* 321 U.S. 158, 166 (1944) it was stated that "it is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. . . . And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter." This protected area of child rearing has been reinforced by successive decisions of the Court and includes the right to have one's child learn a foreign language, *Meyer v. Nebraska,* 262 U.S. 390 (1923) and the right to provide one's children with religious training as well as secular training, *Pierce v. Society of Sisters,* 268 U.S. 510 (1925). See also *Prince v. Massachusetts, supra.*

These early cases were based on an analysis of the concept of liberty as guaranteed to citizens against arbitrary governmental interference by the due process clause of the Fourteenth Amendment. Their vitality has been reaffirmed in several recent decisions. In *Wisconsin v. Yoder,* 406 U.S. 205 (1972) this Court addressed the

fundamental importance of parental control over the nurture of children in the context of a state's attempt to interfere with Amish families in the education and religious activities of their children:

> Ths history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition. *Wisconsin v. Yoder,* 406 U.S. at 232.

The following term, in *Roe v. Wade,* 410 U.S. 113 (1973), this Court held that the right to privacy, as exemplified by its extension to family relationships and the education and rearing of children, also protects "a woman's decision whether or not to terminate her pregnancy." 410 U.S. at 153. This decision upheld the right of a parent to make, free from state interference, the initial and basic decision about the nurturing of children – whether or not to have a child. Similarly, *Paris Adult Theater I v. Slaton,* 413 U.S. 49 (1973), confirms that the right of privacy encompasses and protects "the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing." 413 U.S. at 65. *Accord, Griswold v. Connecticut,* 381 U.S. 479 (1965); *United States v. Orito,* 413 U.S. 139 (1973). This right to the companionship, care, management, and custody of one's children is fundamental and is far more precious than property rights. *May v. Anderson,* 345 U.S. 528, at 533 (1953); *Stanley v. Illinois,* 405 U.S. 645 (1972).

While most of the decisions discussed above focus on the right of biological parents to raise their children, it is clear that the concept of "parent" extends equally to

blood-related persons occupying the role of parent. Thus, in *Prince v. Massachusetts, supra,* the right was recognized to include the decisions made by an aunt who was raising her niece, a relationship substantially similar to the relationship between Inez Moore and her grandson. This conclusion is inevitable in light of the studies, referred to at p. 9-13 of this brief, showing the crucial role in child rearing played by "substitute parents" in subcultures of our society and in situations where tragedy has taken one or both of a child's parents. This conclusion is reinforced by the centuries-old preference accorded grandparents in the common law of natural guardians[26] and by the deference historically given to grandparental decision-making over children upon the death or disability of one or more of the child's parents.[27]

[26]See *Ratcliffe's Case*, 3 Co. 38 b (1592) and accompanying commentary in 76 English Reports 713, 715 n a. More recently see *In re Hall*, 235 N.C. 697, 71 S.E. 2d 140 (1952); *In re Guardianship of Moran*, 116 N.J. Super. 238, 281 A.2d 816 (1971). These latter cases prefer grandparents to other relatives in the creation of natural guardianships.

[27]Plymouth colony records provide striking illustrations of the role of grandparents in raising children. The will of a Swansea, Massachusetts man provided that "conserning all my five children, I do wholly leave them all to the ordering and disposing of my owne father . . . for him to bring them up not once questioning but that his love and hate for them wil bee as it hath bine for my selfe." Demos, *A Little Commonwealth: Family Life in Plymouth Colony*, p. 121 (1970).

In another case, a step-father of four children about to marry again writes to the children's grandfather to ask what he should do. The grandfather asks that one child be sent for him to raise, while one will be sent to a trade and two kept at home. The author comments that the striking thing is the manner in which this was decided. It was assumed that ultimate responsibility for the children's welfare belonged not to their step-father (who had known them on intimate terms for some five years) but to their grandfather (who probably had never seen them at all). This is a powerful comment on the importance which the colonists attached to ties of blood. *Id.*, pp. 122-23.

The right to privacy in family decisions concerning the nurturing of children applies to the appellant Inez Moore. She has raised her grandson John Jr. since the child's mother died when he was less than a year old. She has provided him with maternal care and affection for nine years and today stands as if she were the child's natural mother. The living arrangements for her grandson, and other decisions about his upbringing, are a product of the joint responsibilities of the appellant and the boy's father. The right to privacy protects their authority and judgment over the rearing of appellant's grandson John Moore, Jr.

If protected child rearing decisions extend to the choice of language and religious instruction for the child, they must indeed include the fundamental decisions of where and with whom the child shall live. In this instance the choice of a living arrangement for the child is a choice of maternal care for the child, a choice crucial to the child's survival. Without a family arrangement, the other protected child-rearing activities – education, religious training, and teaching of family and moral values – are meaningless.

B. The Ordinance Denies All Members of the Moore Family Unit the Right To Establish a Home Together and to Define the Composition of their Family.

This case challenges the determination by a municipality that it is unlawful and punishable by criminal sanctions for a grandmother, two sons, and two grandchildren to make a joint decision to maintain a home together for their mutual support and benefit.

These relatives have a constitutional right, guaranteed by their rights to privacy and freedom of association, to build upon their blood relationship and maintain their familial association in a residential context. This right is complementary to the right of parents to control the nurturing and rearing of their children.

The right to privacy has been recognized in many decisions of this Court. While it is nowhere explicitly mentioned in the Bill of Rights, its roots have been found in the First Amendment, *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); the Fourth and Fifth Amendments, *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968); the Ninth Amendment, *Griswold v. Connecticut*, 381 U.S. 479, 484-5 (1965) (Goldberg, J., concurring); the penumbras of the Bill of Rights, *Id.*, at 484-485; and in the concept of liberty guaranteed by the Fourteenth Amendment, *Id.*, at 500 (Harlan, J., concurring). *Roe v. Wade*, 410 U.S. 113, 153 (1973).

Many of the zones of privacy established by the leading cases overlap at a central focus – the composition of the family home. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Stanley v. Georgia*, 394 U.S. 557 (1969). The home itself has long been considered to be a sanctuary of personal privacy. "The sanctity of a man's home" and "the privacies of life," *Boyd v. United States*, 116 U.S. 616, 630 (1886), *Griswold v. Connecticut*, 381 U.S. at 484, are closely intertwined and interdependent concepts. Many of a citizen's rights to privacy are restricted to a place, the home, where a zone of privacy protects a myriad of personal decisions and actions. *Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973); *Stanley v. Georgia, supra; United States v. Orito*, 413 U.S. 139 (1973).

The right of privacy is particularly applicable to an individual's decision to marry and create a family. *Roe v. Wade*, 410 U.S. 113 (1973); *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479; *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Eisenstadt v. Baird*, 405 U.S. 438 (1972). The fundamental decision of "whether to bear or beget a child," *Eisenstadt v. Baird*, 405 U.S. at 453, is in essence a decision to determine the extent of one's own offspring and indeed the extent of one's own family.

In *Roe v. Wade, supra*, the court analyzed several factors surrounding a woman's decision to have an abortion that placed such a decision in the protected zone of privacy. These factors included the distress for the mother and the other members of the family caused by an unwanted child and the problems caused by bringing a child into a family unable, psychologically and otherwise, to care for it. Both of these factors rest on the idea that disruption of a family unit by the state violates the individual's right to privacy.

Another source of the right of family members to establish a home together is their freedom of association. The right of individuals to freely associate has long been held to be implicit in the First Amendment freedoms of speech, assembly and petition. *Kusper v. Pontikes*, 414 U.S. 51 (1973); *Healy v. James*, 408 U.S. 169 (1972); *NAACP v. Button*, 371 U.S. 415 (1963); *NAACP v. Alabama*, 357 U.S. 449 (1958). At the center of the First Amendment freedom of association is the conviction that the integrity and vitality of human association should be protected from unwarranted governmental interference. This conviction extends to protect association not only for political ends, but to other forms of associational activity,

"whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters." *NAACP v. Alabama,* 357 U.S. 449, 460 (1958). Thus, the court has extended First Amendment protection to associations for economic purposes, *United Mine Workers of America, District 12 v. Illinois Bar Assn.,* 389 U.S. 217 (1967), *cf., Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961), and to associations for social, professional, avocational and religious purposes, *Shelton v. Tucker,* 364 U.S. 79 (1960).

This Court has indicated that freedom of association among family members for family purposes is entitled to at least as much protection. Marriage is an association of a protected character. *Griswold v. Connecticut,* 381 U.S. 479 (1965). Similar recognition was given to the protected associational aspects of marriage in *Boddie v. Connecticut,* 401 U.S. 371 (1971). As discussed in *United States v. Kras,* 409 U.S. 434, 444 (1973), "the denial of access to the judicial forum in *Boddie* touched directly on the marital relationship and on the associational interests that surround the establishment and dissolution of that relationship." See also *Loving v. Virginia,* 388 U.S. 1 (1967).

As marriage is an association, so is the family in its inclusion of children, parents, grandparents, brothers and sisters. Cf. *Prince v. Massachusetts, supra.* In contrast to the students in *Village of Belle Terre v. Boraas, supra,* the purpose of this association among the members of the family unit is the preservation of individual family members, the preservation of the family itself, and indeed the preservation of society. As termed by the early Puritans, the family is "the root

whence Church and Commonwealth cometh" and is "the foundation of all societies."[28]

These principles of freedom of association coalesce around the common denominators of the family home and the composition of the family.[29] The concepts are inseparable. The establishment of a family home is in itself a decision about who will share that home. These are matters of intensely personal choice and matters which society has historically considered to be beyond the province of legitimate governmental intrusion, "This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Cleveland Board of Education v. LaFleur,* 414 U.S. 632, 639-40 (1974).

Such family matters are not unique to the textbook nuclear family, but as the relevant literature shows[30] and as common sense tells us, they are common to all families. Surely Mrs. Moore's decision to establish a home wherein John Jr. may live with her is no less

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[28]Cotton Mather, *A Family Well-Ordered*, p. 3, as quoted in Morgan, *The Puritan Family*, p. 143.

[29]See the opinion of Mr. Justice Harlan in dissent in *Poe v. Ullman*, 367 U.S. 497, 551-52, as quoted with approval by Mr. Justice Goldberg in his concurring opinion in *Griswold v. Connecticut*, 381 U.S. 479, 495 (1965):

> Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. The home deprives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right.

[30]See the materials on the family cited at pp. 9-13, *supra.*

intimate than a similar decision made by the child's natural mother, were she alive. To consider otherwise would be to disfavor many of the families of our forefathers[31] and many natural families in con-

[31]Many of the nation's most eminent citizens established or were raised in family settings which East Cleveland defines as illegal. John Adams, busy with diplomatic duties and political activity, sent a daughter to live with her aunt. His son John Quincy Adams, later to be the nation's sixth President, lived with a brother and an aunt and uncle, while being tutored for entrance into college. Hecht, *John Quincy Adams*, pp. 12-13 (1972).

Thomas Jefferson's parents took over the care of the children of his mother's cousin when the cousin's death left them orphans. They set up a household for seven years with their four children and the four children of the deceased cousin. Peterson, *Thomas Jefferson and the New Nation*, pp. 6-7 (1970).

When James Buchanan, a bachelor, took office as the fifteenth President, he moved in with his sister and his sister's son, aged twenty-four. Klein, *President James Buchanan: A Biography*, pp. 124-128, 273-75 (1962).

Herbert Hoover, at age six, lived with an uncle in Arkansas after his father died. His mother died two years later, which required that arrangements be made for raising the three Hoover children. A grandmother took one child. An aunt and uncle took another, and another aunt and uncle assumed guardianship of Herbert Hoover. Between the ages of ten and seventeen he was raised by another uncle, who saw him as the replacement for his own eldest son who had recently died. Lyons, *Herbert Hoover: A Biography*, pp. 10-22 (1964).

While her father was sick, Eleanor Roosevelt lived with her mother and aunt. Two of her brothers were brought up by another aunt. Her mother died when she was eight. The widowed father, still sick and unable to raise his children, died two years later. The three Roosevelt children were then raised in a household containing their grandmother, two uncles, and two aunts. Roosevelt, *The Autobiography of Eleanor Roosevelt*, pp. 3-17 (1958).

Others include Stephen A. Douglas [Johannsen, *Stephen A. Douglas*, pp. 5-11 (1973)], Millard Fillmore [Rayback, *Millard Fillmore: A Biography* (1972)] and William Cullen Bryant [Brown, William Cullen Bryant, pp. 14, 34 (1971)].

temporary society.[32]

By arbitrarily ruling out certain groupings of blood-related family members, the City of East Cleveland has substantially interfered with the right of the Appellant and her children and grandchildren to, as enunciated in *Meyer v. Nebraska*, 262 U.S. 390 (1923), "establish a home and bring up children." This interference is indeed substantial. The ordinance's restrictive definition of "family" applies to all dwelling units within the municipal boundaries of East Cleveland. There exists no dwelling unit within that community where the Moore family may reside without Mrs. Moore being subjected to fine and imprisonment.

In theory Mrs. Moore could sell her home and leave East Cleveland, as long as other communities do not adopt similar ordinances. To uproot herself and her family, however, would be economically unfeasible and would be extremely disruptive to her family.[33] As a homeowner, she has, in addition to the personal rights discussed above, a protected property interest in her home in East Cleveland. To force surrender of her property rights is to place an unconstitutional burden on the exercise of her rights of privacy and freedom of association. *Dunn v. Blumstein*, 405 U.S. 330, 331 (1972).

Moreover this Court has never recognized the unpleasant option of selling one's home and relocating

[32]See pp. 11-13, *supra*.

[33]Mrs. Moore is not in a financial position to move. To illustrate, this case has proceeded throughout *in forma pauperis* and the Appellant is represented by counsel from the Legal Aid Society of Cleveland.

elsewhere as a release mechanism which strips a citizen of his constitutional rights. In the prior zoning-related decisions of this Court the availability of such an option has never served to justify an invasion of rights. See *Buchanan v. Warley*, 245 U.S. 60 (1917); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943). See also *Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928). The city-wide exclusionary feature of the East Cleveland ordinance is in sharp contrast to the zoning ordinance in *Young v. American Mini Theatres, Inc.*, ____ U.S. ____, 44 U.S.L.W. 4999 (1976). There the City of Detroit was found to have permissibly regulated the location of adult movie theatres *within* the city through the vehicle of an ordinance which did not interfere with the freedom of the distributors and exhibitors to market their product in the city.

C. The Appellee Can Tender No Compelling Governmental Interest To Sustain This Overly Broad Ordinance.

While the rights of privacy and freedom of association are not absolute, they can only be infringed in order to substantially advance a compelling governmental interest. *Roe v. Wade*, 410 U.S. 113 (1973); *Williams v. Rhodes*, 393 U.S. 23 (1968); *NAACP v. Button*, 371 U.S. 415 (1963); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Bates v. Little Rock*, 361 U.S. 516 (1960); *Prince v. Massachusetts*, 321 U.S. 158 (1944). The burden of showing that a governmental interest is compelling is heavy, and rests upon the state. *Memorial Hospital v. Maricopa County*, 415 U.S. 250, (1974); *Roe v. Wade, supra.*

In considering the nature of the governmental interests behind this ordinance, it should again be stressed that the ordinance interferes in perhaps the most direct and drastic way possible with the right to nurture children and the right of a family to establish a home together. The ordinance here goes far beyond the indirect and incidential effect upon constitutional rights that was found fatal in *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974); *Healy v. James*, 408 U.S. 169 (1972), and *NAACP v. Button, supra.* This ordinance expressly and flatly prohibits certain family members from living together, and enforces this prohibition by criminal prosecution, fine, and imprisonment.

The City of East Cleveland justifies the challenged ordinance as limiting population density, traffic congestion, and school population; it is also asserted that this ordinance serves the governmental interests of ease of enforcement and the maintenance of property values. None of these governmental interests has ever been deemed so "compelling" as to justify an invasion of fundamental or First Amendment rights. At most, the concerns advanced by the city are matters of incidental importance to the community, untouched by the urgency or magnitude of a compelling state interest.

It is clear from the case law that a governmental interest is "compelling" only if it seeks to protect a paramount interest of society from substantial and serious harm. *Sherbert v. Verner*, 374 U.S. 398 (1963). In *Roe v. Wade, supra*, for example, the Court found that the state had a legitimate interest in protecting a woman's life and health and the potentiality of human life in a fetus. Even these weighty concerns, however, were only deemed "compelling" after the third

trimester of pregnancy, when the fetus was viable and the magnitude of risk to the mother was greatest. A threat of substantial harm to the physical or mental health of a child has also been deemed "compelling," justifying state intrusion on First Amendment rights in some circumstances. *Wisconsin v. Yoder*, 406 U.S. 205 (1972); see also *Prince v. Massachusetts, supra.* Compare *Runyon v. McCrary*, ____ U.S. ____, 44 U.S.L.W. 5034 (1976) (where the governmental policy against racial discrimination justified limited intrusion). Another area of governmental activity that may give rise to a compelling interest is national security, *Korematsu v. United States*, 323 U.S. 214 (1944), although even these interests are often insufficient to override First Amendment claims. *United States v. Robel*, 389 U.S. 258 (1967); *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943). The same is true of the state's interest in compelling all children to attend school up to a certain age. *Wisconsin v. Yoder, supra.*

Many other governmental interests, although legitimate, have been held to fall short of "compelling." The protection of the public fisc and the desire not to dilute government programs will not justify the invasion of fundamental rights, *Shapiro v. Thompson*, 394 U.S. 618 (1969), even though these are legitimate and important public concerns. Accord, *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974). Nor can invasion of such rights be justified to discourage fraud in the receipt of governmental benefits, *Sherbert v. Verner*, 374 U.S. 398 (1963), *Memorial Hospital v. Maricopa County, supra;* to prevent a remote danger of confusion on the ballot, *Williams v. Rhodes, supra;* to maintain professional standards in an occupation, *NAACP v. Button, supra;* or for administrative

convenience, *Dunn v. Blumstein*, 405 U.S. 330 (1972).

The interest advanced by East Cleveland in justification of this ordinance are slight by comparison to the governmental interests that other cases have deemed compelling. There is no well documented (through the testimony of urban planners and others) threat to the very character of residential neighborhoods as was relied on to support a considerably less intrusive ordinance in *Young v. American Mini Theatres, Inc.*, ____ U.S. ____, 44 U.S.L.W. 4999 (1976). The ordinance does not seek to prevent substantial harm to any person's physical or emotional health, but rather engenders such risks for children and adults by breaking up families. While high property values may be important to a city, this purely economic objective cannot compare with truly compelling interests.[34] Increased traffic, large school attendance, and population density do not threaten the survival of the city in the manner of wartime threats to national security. *Korematsu v. United States, supra.* The interests that the ordinance purports to advance are at heart the protection of public facilities from dilution by additional people – a goal specifically determined not to be compelling in *Shapiro v. Thompson* and *Memorial Hospital v. Maricopa County, supra.*

Another fatal flaw in the ordinance is that it has no substantial effect on the governmental interests it purports to advance. East Cleveland has already passed laws requiring a certain amount of floor space for each resident; any additional effect that this ordinance has

[34] Ease of enforcement, one of the interests allegedly advanced by the ordinance, is nothing more than administrative convenience.

on population density is *de minimis*. Traffic congestion and school population are unlikely to be affected by the relationships of the persons living in a home. Property values will not be enhanced by the breaking up of family units, but will more likely deteriorate.

The ordinance is unconstitutional because of its overly broad sweep across fundamental rights. Even where a governmental interest is compelling, the state may not pursue it by means that unnecessarily interfere with the freedom of association or the right of privacy, but must choose a less restrictive method, if one is available, of accomplishing its goals. *Kusper v. Pontikes*, 414 U.S. 51 (1973); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964). As stated in the context of freedom of association, "(p)recision of regulation must be the touchstone in an area so closely touching our most precious freedoms," *NAACP v. Button*, 371 U.S. 415, 438 (1963).

Thus an attempt to regulate traffic congestion through an ordinance such as this must fail in view of the variety of less restrictive alternative methods of achieving the same purpose such as motor vehicle taxes, specific traffic ordinances and traffic enforcement. Similarly East Cleveland cannot be permitted to regulate population density (and in turn the related goal of reduction in school population) by a family-definitional ordinance when it already has created effective mechanisms for achieving the same objectives. Residential areas under East Cleveland's existing zoning ordinances are classified with density control as an object into multiple dwelling, two family dwelling and single family dwelling uses. Within each dwelling unit, occupancy limits control the number of persons who may live in that unit; see p. 47, *infra*. The very

existence of these ordinances indicates conclusively that "means for achieving the same basic purpose" (*Griswold v. Connecticut*, 381 U.S. at 498) are available to East Cleveland without the need to invade an area of protected freedoms.

III.

THE ORDINANCE OFFENDS THE EQUAL PROTECTION CLAUSE AS IT SUBJECTS MEMBERS OF ONE CLASS OF FAMILIES TO CRIMINAL SANCTIONS WITHOUT ADEQUATE JUSTIFICATION.

The East Cleveland Ordinance classifies families into two categories: 1) those whose composition is encompassed within the definition of family provided in §1341.08;[35] 2) those consisting of any other grouping of relatives who live together as a single housekeeping unit.[36] Members of families in the first category are permitted to live together in East Cleveland; members

[35]This is basically the grouping of husband and wife with their unmarried children, with the following exceptions: one, but only one, parent of the husband or wife may live in the family; one, but only one, married child may live in the family with his or her spouse and children, provided the married child is dependent upon the head of the household for support; one, but only one, set of grandchildren may live in the family, again provided that the parent of such grandchildren is dependent upon the head of the household for support.

[36]This excludes many children, grandchildren, and parents of the head of the household, as well as all of his or her siblings, aunts, uncles, nephews, nieces, and other blood relatives.

of families in the second category are not. Size of the family is not a relevant factor in the definition of each class and, in fact, the number of persons permitted to occupy each dwelling unit is specified elsewhere in the municipal ordinances.

A. Since the Classification Infringes on Rights which are Fundamental under the Constitution, It Can Only Be Sustained upon a Showing that It Is Necessary to Promote a Compelling State Interest; Such a Showing Cannot Here Be Made.

Under the prior decisions of this Court, a classification which is inherently suspect, such as race, requires a compelling state interest to sustain it. See e.g. *McLaughlin v. Florida,* 379 U.S. 184 (1964). Similarly, a classification which invades one or more rights established as fundamental under the Bill of Rights will be subjected to the same strict scrutiny by the Court, and will require a compelling state interest to survive attack under the Equal Protection Clause of the Fourteenth Amendment. *Shapiro v. Thompson,* 394 U.S. 618 (1969).

> "But in moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest is unconstitutional." (Emphasis in original). 394 U.S. at 634.

In *Dunn v. Blumstein,* 405 U.S. 330 (1972) this Court emphasized that the standard enunciated in *Shapiro* is strict. The Court in *Dunn* quoted the *Shapiro* language quoted above, and added emphasis to the

work "necessary:" "*necessary* to promote a *compelling* governmental interest . . . (first emphasis in original)." *Dunn v. Blumstein,* 405 U.S. at 342. The Court in *Dunn* found that there was a compelling governmental interest at stake, but that the restrictions placed on individuals' rights to vote and to travel – fundamental rights – were not necessary. The restrictions were unnecessarily broad and overly inclusive.

> Here, there is simply too attenuated a relationship between the state interest in an informed electorate and the fixed requirement that voters must have been residents in the State for a year and the county for three months. Given the exacting standard of precision we require of statutes affecting constitutional rights, we cannot say that durational residence requirements are necessary to further a compelling state interest. 405 U.S. at 360.

See also *Memorial Hospital v. Maricopa County,* 415 U.S. 250, 263 (1974); *Marston v. Lewis,* 410 U.S. 678 (1973); *Evansville-Vanderburgh A.A. Dist. v. Delta Airlines, Inc.,* 405 U.S. 707, 714 (1972); *Graham v. Richardson,* 403 U.S. 365, 375-6 (1971); *Cipriano v. City of Houna,* 395 U.S. 701, 704 (1969).

The requirement that the classification be *necessary* to promote the compelling interest can be seen also as a prohibition of overbreadth. If less drastic alternatives are available to accomplish the same goals, the statue sweeps too broadly and violates the Equal Protection Clause. *Shapiro v. Thompson,* 394 U.S. 637 (1969); *Shelton v. Tucker,* 364 U.S. 479, 488 (1960).

The City of East Cleveland has failed to demonstrate that the challenged ordinance promotes a compelling governmental interest. Prevention of overcrowding and traffic congestion are legitimate governmental interests,

but they do not rise to the level of compelling interests which are sufficient to justify the ordinance. See Part II(C) of this brief, *supra*, at p. 32. Furthermore, the restrictions placed on family privacy and association are not necessary to promote the interests which Appellee cites as underlying the ordinance. Limitations on the number of occupants per square foot are sufficient to protect the City's interests, and in fact the City has legislated such limitations.[37] Traffic congestion and parking can be directly regulated through traffic and parking ordinances, purposeful location of parking lots, etc. The breaking up of families is not necessary to maintain property values; if anything, such a destructive measure would reduce the quality of life in the city. Since alternative means of protecting the City's interests exist and in some cases have been utilized, it is clear that the City's interference in family composition is not necessary.

B. In Addition, the Classification Fails to Bear even a Fair and Substantial Relation to the Object of the Legislation.

Should Appellant's position that a stricter standard of review is required under the Equal Protection Clause by reason of interference with the fundamental rights of privacy and freedom of association be rejected, this classification nevertheless fails to pass muster under the "fair and substantial relation" test, the standard of review traditionally applied in zoning cases when no fundamental rights are threatened.

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[37] §1351.03.

After determining in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) that the case involved "no 'fundamental' right guaranteed by the Constitution," 416 U.S. 1, 7, the Court looked to *Reed v. Reed*, 404 U.S. 71 (1971) for the proper standard by which to measure the legislative classification. The full enunciation of the *Reed* standard is to be found at 404 U.S. 71, 75-76, in which the Court applies a line of equal protection cases including *Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920). After acknowledging that the Fourteenth Amendment does not entirely deny the States the power to treat different classes of people differently, the *Reed* Court said:

> The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415, 40 S. Ct. 560, 561, 61 L. Ed. 989 (1920). 404 U.S. at 75-6.

This standard of review has been relied upon by the Court in a number of Equal Protection cases decided subsequent to *Reed*. See e.g. *Johnson v. Robinson*, 415 U.S. 361 (1974); *Kahn v. Shevin*, 416 U.S. 351 (1974); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Stanton v. Stanton*, 421 U.S. 7 (1975). The "fair and substantial" phraseology is identical to the articulation of the appropriate standard of review in the early zoning cases which measured zoning laws against the

dictates of substantive due process. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Nectow v. City of Cambridge*, 277 U.S. 183 (1928).

This test by no means provides automatic validation for legislative classifications. See e.g. *Weinberger v. Wiesenfeld, supra; Stanton v. Stanton, supra;* and *Reed v. Reed, supra.* The test focuses on the actual, as opposed to hypothesized, legislative purposes, and excludes those conjured-up hypothetical purposes which could not rationally have been the object of the legislation. See *Department of Agriculture v. Moreno*, 413 U.S. 528 (1973) and *Eisenstadt v. Baird*, 405 U.S. 438 (1972). The test also requires that the fair and substantial relation be grounded on some plausible view of empirical reality; wholly unsubstantiated speculation is insufficient. *Eisenstadt v. Baird, supra; Department of Agriculture v. Moreno, supra.* In addition, the legislative goal sought to be achieved by the regulation must be legitimate. Otherwise, the classification fails without further analysis, *Department of Agriculture v. Moreno*, 413 U.S. 528, 534-5 (1973).

There exist no City Council minutes nor committee reports which might assist this Court in identifying the purposes of the ordinance in question.[38] Under the

[38]The legislative history, as Appellant can best reconstruct it, is as follows: In 1922 East Cleveland was zoned into various traditional categories, including single family, two family and multiple family uses. See generally, *State ex rel. Killeen Realty Co. v. East Cleveland*, 108 O. App. 99, 153 N.E. 2d 177 (1958), *aff'd*, 169 O.S. 375, 160 N.E. 2d 1 (1959). In 1953 a definition of family was added to the ordinance:

> *Section 1.014* A "family" is any number of individuals related to the nominal head of the household as husband or wife, son or daughter, father or mother, sister or brother, or their spouses and dependent children living together as a single housekeeping unit and having facilities for cooking and sleeping in that part of the premises occupied by it. A "family" may consist of one individual. [Ord. No. 4761; Nov. 17, 1953]

(continued)

City's Charter, which lists the permissible purposes of city legislation, the City may:

> . . . define, prohibit, abate, suppress, and prevent all things detrimental to the health, morals, comfort, safety and convenience and welfare of the inhabitants of the City and all nuisances and carrier thereof; may regulate the construction,

(footnote continued from preceding page)

A narrower definition was adopted in 1961 at the time a Housing Code was adopted in East Cleveland (apparently leaving the previous definition on the books):

> Section 3-7 *Family.* A "family" is a number of individuals related to the nominal head of the household, living as a single housekeeping unit in a single dwelling unit, but limited to the following:
>
> A. Husband or wife of the nominal head of the household;
>
> B. Son or daughter of the nominal head of the household and the spouse and dependent children of such son or daughter;
>
> C. Father or mother of the nominal head of the household or of the spouse of the nominal head of the household;
>
> D. Dependent brother or sister of the nominal head of the household or of the spouse of the nominal head of the household, which brother or sister is not living with his or her spouse, and his or her dependent children.
>
> A family may consist of one individual. [Ord. No. 5320; Mar. 21, 1961]

In 1964 the present language of §1351.02 limiting occupancy of any dwelling unit to one family was added. [Ord. No. 5587; Nov. 17, 1964]. Finally, the definition of family was amended to reflect its present form on July 26, 1966. Ordinance No. 5743 amended previous section 1.014 and Ordinance No. 5744 amended previous section 3-7. Evidently these sections were later combined and renumbered, without change, in Ordinance No. 6010.

height, and the material used in all buildings and the maintenance and occupancy thereof; . . . and may pass such ordinances as may be expedient for maintaining and promoting the peace, good government and welfare of the City, and for the performance of the functions thereof . . ." Charter of the City of East Cleveland, Section 1.

The Housing Code of the City of East Cleveland, which contains the ordinance under which Appellant was convicted, is preceded by a statement of its purposes:

> Within the scope of this Housing Code as hereinafter defined, the purpose of this Housing Code is: to establish minimum standards necessary to make all dwelling structures safe, sanitary, free from fire and health hazards, and fit for human habitation and beneficial to the public welfare; to establish minimum standards governing the maintenance of dwelling structures in such condition as will not constitute a blighting or deteriorating influence on the neighborhood and the community; to protect property values and to maintain the character and appearance of the community and neighborhoods within the community; to fix responsibilities for owners and occupants of dwelling structures with respect to sanitation, repair and maintenance . . . . Housing Code of the City of East Cleveland, Section 1343.02.

Appellee asserts, at least in part based on the above purpose clauses, the following legislative purposes:

> Therefore, Section 1341.08 is needed to prevent such multiple family habitation in a single family dwelling, to prevent overcrowding, traffic and parking congestion, an undue burden on East Cleveland's school system, the diminution of the property value and character of the neighborhood; and to fix responsibilities for enforcement purposes; all of which are proper exercises of the police power for the public welfare of the community. (Appellee's Motion to Dismiss at p. 13).

Appellee's justifications must be individually considered.[39]

1. To prevent multiple family habitation in a single family dwelling.

This is a legitimate legislative goal, but to state it as the justification of the challenged ordinance is to beg the question. Appellant does not dispute the City's right to preclude more than one family from occupying a single family dwelling unit. If the City's power to pass

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[39]The 1966 amendments to the ordinance excepted John Moore, Jr. from the definition of "family". Previously his presence in East Cleveland would have been legal.

In the 1960's and very early 1970's, the City of East Cleveland experienced an abrupt change in its racial character. The city borders on Cleveland proper and as the black migration within Cleveland moved eastward, East Cleveland shifted from an all white community to a nearly all black community. Mrs. Moore, who is black, entered East Cleveland during this time of change.

Between 1965 and 1967, the two years which lie on either side of the date this ordinance was restrictively amended to exclude, *inter alia*, most grandchildren, the East Cleveland public schools shifted from 10% black (1965) to 59% black (1967). Source: documents submitted by East Cleveland School Board in *Moore v. Visci*, Cuyahoga County Common Pleas, #913,922. In this connection, see the discussion at p. 49, *infra* concerning the purported justification for this ordinance in terms of controlling the school population.

such legislation were the issue, then the challenged statute would be §1351.02, which provides that "the occupancy of any dwelling unit shall be limited to one and only one family. . . ." Appellant has no quarrel with this section, which, together with the introductory paragraph of §1341.08, prevents two families of unrelated individuals from occupying the same dwelling unit. Two *separate* families of related individuals are also prevented from sharing a single dwelling unit by §1341.08 which provides that "family means a number of individuals related . . . [and] *living in a single housekeeping unit*" (emphasis added).

The issue before the Court is not whether two families may live in a single family dwelling unit. Rather, it is whether the City may define "family" in such a way as to exclude Inez Moore, her two sons, and her two grandsons from the definition.

2. To prevent overcrowding.

This purpose, in essence the control of population density, is legitimate. *Village of Belle Terre v. Boraas, supra.* However, there is no "fair and substantial" relationship between this purpose and the family-definitional ordinance at issue. Section 1341.08 has nothing to do with the size of the household; rather, it concerns itself with the *relationships* of the family members. Some large families (for example, a mother and father and their ten children) will fall within the definition of "family" in the ordinance, and thus be allowed to live in a single family dwelling unit. Other smaller families (the Moore family, for example, which has only 5 members) will fall outside the definition of

"family" and will not be allowed to live in a single family dwelling unit, no matter how large that unit may be.[40] Indeed, many two relative households are prohibited, such as a home consisting of two elderly sisters or two college age brothers. The ordinance permits one unmarried child to have an unlimited number of dependent children and remain in the household; however, should a second unmarried child bring a single child of his or hers into the home, the group is no longer a "family" and is not permitted to live together in East Cleveland.

These examples demonstrate that the language of the ordinance is not even loosely tailored in the direction of density control and therefore the ordinance bears no fair and substantial relation to this purported objective. Moreover, the ordinance, to the extent that it has *any* effect at all on the number of persons living in a given dwelling unit, is a form of overkill. East Cleveland has a per person occupancy ordinance expressly designed for this purpose and which establishes occupancy limits based upon logical criteria, namely the amount of living space in square foot terms available to each inhabitant. The family-definitional ordinance superimposes a second set of criteria (allegedly density oriented) which are arbitrary in that they contribute nothing of value to the achievement of the stated objectives. When §1341.08 is seen in conjunction with the per person occupancy limitation contained in §1351.02, the former section is as irrational as the double appeal bond requirement of the Oregon forcible entry and detainer statute stricken

[40]The City of East Cleveland has in fact informed Mrs. Moore that, under the density control ordinance, she may legally house seven persons in her home.

by this Court in *Lindsey v. Normet*, 405 U.S. 56 (1972) and as arbitrary as the household definition requirements for the food stamp program stricken in *Department of Agriculture v. Moreno*, 413 U.S. 508 (1973). In *Moreno* this Court rejected the Government's argument that the household-definitional section was rationally related to the legitimate purpose of controlling fraud in the food stamp program when the Act itself created civil and criminal provisions expressly designed for this purpose.

3. To prevent traffic and parking congestion.

This purpose is essentially a more particularized ingredient of the density-control objective, and is subject to the same fatal deficiencies. In addition, the question must be asked whether those persons excluded from the definition of family are likely to contribute to the traffic and parking congestion in East Cleveland. The answer is plainly no.

Mrs. Moore's family is a good example. According to East Cleveland, John Moore, Jr., presently 10 years old, is a second "family" and must, because of East Cleveland's need to reduce traffic and parking congestion, leave the municipality. No ordinance which is largely directed at minor children who have not achieved the lawful driving age and at elderly persons who are extremely unlikely to drive automobiles, bears a fair and substantial relation to this objective. Contrast the ordinance in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) which had the effect of excluding a combination of six college students. There is, it would seem, an empirical likelihood that six unrelated students

(all attending school outside of the community) would own and drive cars in substantially greater numbers than the typical blood-related family unit. This court noted that "the regimes of boarding houses, fraternity houses, and the like present urban problems. . . . [M]ore cars rather continuously pass by; more cars are parked." 416 U.S. at 9.

This classification bears no relationship to the traffic/parking objective because it primarily excludes those persons who are either unable or highly unlikely to drive and/or own a motor vehicle. It is probably more likely that the ordinance serves to complicate East Cleveland's traffic problems in its subdivision of families, thereby preventing a family from sharing a single automobile.

4. To prevent an undue burden on the school system.

Appellee argues that the challenged ordinance will limit traffic and parking congestion *and* that it will prevent an undue burden on the school system. Thus, it is Appellee's position that the ordinance will tend to weed out school age children *and* driving age adults. This dichotomy demonstrates that Appellee is simply trying to limit population through the use of the challenged ordinance. For the reasons discussed above, the ordinance is an impermissible means of pursuing that goal. **(See Part III(B)(2) of this brief, *supra* at p. 46).**

In addition to lacking a fair and substantial relation to the ordinance, the goal of lowering the burden on the school system is not, in this context, a permissible or legitimate governmental interest. Public education in Ohio is not a function of municipal government. It is a

State function and local school districts are creatures of the State government. While school districts are sometimes co-extensive with municipal boundary lines, they frequently, as in this instance,[41] do not align precisely with municipal boundary lines.[42] The municipal government of the city of East Cleveland has no authority to exclude children from the East Cleveland Public Schools.

> The right of a city to legislate does not extend to matters relating to the public schools. No plenary powers of control and maintenance of the common schools were granted to the municipalities of the state by the Constitution, and no board of education or legislative authority of any municipality has power to override or disregard any of the constitutionally valid legislative provisions applying to schools. Furthermore, local self-government has no relation to the administration of the common schools of the state. The home rule provisions of Article 18 of the Ohio Constitution were not intended to authorize municipalities to invade the field of the state or detract from its power to secure a thorough and efficient system of public schools.
>
> The only grant of power over public schools to local authorities in the Ohio Constitution is the provision in Article 6, §3, that each school district wholly or partly embraced within any city shall have the power to determine by referendum vote the number of members and the organization of its board of education, and that provision shall be

[41]The East Cleveland School District includes a substantial portion of the City of Cleveland Heights.

[42]O.R.C. §3311.02. See also O.R.C. §§3311.03, .04, .05 and .051.

> made by law for the exercise of this power by such school districts. 48 O. Jur. 2d, Schools, §4.

In addition to its lack of authority in general to legislate in this area, it should be noted that presumably, by this ordinance, East Cleveland is attempting to impermissibly regulate the right of students to attend school under state law. The State of Ohio has made school compulsory for children between the ages of six and eighteen. O.R.C. Chapter 3321. It has imposed the obligation of making free schooling available to all "school residents" between the ages of six and twenty-one on the school districts. O.R.C. 3313.64. "School residents" are defined in Ohio law as "all youth who are children or wards of actual residents of the school district." O.R.C. 3314.64. The language "ward" has been consistently interpreted in a broad sense to include children over whom an adult stands "*in loco parentis,*" even without the existence of a legal guardianship. 1918 Ohio Atty. Gen. 543; 1927 Ohio Atty. Gen. 160; 1932 Ohio Atty. Gen. No. 4864; 1963 Ohio Atty. Gen. No. 545. The City may not rely on a desire to circumvent this statutory scheme as a justification for the challenged ordinance.[43] Only a

[43]The facts in the instant case suggest that this impermissible objective may be behind the challenged ordinance. John Moore, Jr. was allowed to live unchallenged in East Cleveland during his pre-school years. When he attempted to attend school, he was initially accepted and then later asked to leave until such time as his grandmother secured guardianship over him, a wholly impermissible requirement under Ohio law. When Mrs. Moore objected (she eventually filed suit; *Moore v. Visci*, Cuyahoga County Common Pleas, No. 913,922) the Housing Department commenced its efforts to enforce §1341.08 against the child. This enforcement of the Housing Code hand-in-hand with the efforts of the school system to unlawfully exclude John, Jr. certainly suggests that the ordinance carries an illegitimate purpose.

legitimate state purpose can support a legislative classification against an Equal Protection challenge. *F.S. Royster Guano Co. v. Virginia,* 253 U.S. 412 (1920); *Reed v. Reed,* 404 U.S. 71 (1971).

5. To prevent diminution of property values and the character of the neighborhood.

Certainly on the face of things, no connection is apparent between the exclusion of John Moore, Jr. and the other family members excluded by this ordinance and "property values" or the "character" of the neighborhood. Perhaps behind this assertion lies a purpose of limiting the neighborhood to nuclear families composed only of fathers, mothers, and children. Assuming for the sake of argument that such a purpose is legitimate (such a purpose clearly conflicts with this country's historical deference to a more realistic concept of family),[44] the ordinance itself belies this purpose as it permits any one unmarried child to have any number of dependent children with him/her.

[44]See *Palo Alto Tenants Union v. Morgan*, 321 F. Supp. 908, 911 (N.D. Cal. 1970):

> The traditional family is an institution reinforced by biological and legal ties which are difficult, or impossible, to sunder. It plays a role in educating and nourishing the young which, far from being "voluntary", is often compulsory. Finally, it has been a means, for uncounted millenia, of satisfying the deepest emotional and physical needs of human beings. A zoning law which divided or totally excluded traditional families would indeed be "suspect".

See also *Department of Agriculture v. Moreno*, 413 U.S. 528, 534-35 (1973).

6. To fix responsibility for enforcement purposes.

Again, on the face of this legislative scheme it is beyond the ken of the Appellant to envision how the classification in question serves to fix enforcement responsibility for §1341.08 or for any other ordinance. The very first paragraph of the ordinance (to which Appellant does not object) effectively fixes enforcement responsibility with the "head of the household:" " 'Family' means a number of individuals related to the nominal head of the household or to the spouse of the nominal head of the household living as a single housekeeping unit." The offensive exception clauses of the ordinance add nothing to the ease of enforceability of the ordinance. By illustration, Mrs. Moore could be prosecuted for violation of the permissible aspects of the ordinance (e.g. the prohibition against unrelated persons) just as conveniently without the objectionable exception clauses. Moreover it is doubtful that this kind of convenience justification is sufficient to support legislation under the fair and substantial relation test. *Kahn v. Shevin,* 416 U.S. 351 (1974). *Cf. Schlesinger v. Ballard,* 421 U.S. 906 (1975).

In conclusion, none of the six so-called purposes of this classification are sufficient to withstand scrutiny under the fair and substantial relation standard relied on in *Village of Belle Terre* and the classification must fail even disregarding the substantial interference which the ordinance has on interests deemed fundamental.[45]

[45]The due process clause is no longer as commonly relied on as a measure of the constitutionality of legislation. Present day analysis generally focuses on the Equal Protection Clause of the Fourteenth Amendment. Nevertheless the standards set by this court in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) and *Nectow v. City of Cambridge*, 277 U.S. 183 (1928) have not

(continued)

CONCLUSION

The Appellant urges this Court to reverse the conviction on the grounds of the unconstitutionality of the ordinance upon which the conviction was based.

Dated, Cleveland, Ohio, July 2, 1976.

Respectfully submitted,

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(footnote continued from preceding page)
been overturned or questioned. *Nectow* commands that legislative zoning determinations "bear a substantial relation to the public health, safety, morals or general welfare." *Nectow v. City of Cambridge*, 277 U.S. at 188. For the same reasons why this ordinance's restrictive definition of the meaning of "family" fails to create a classification which can survive scrutiny under *Reed v. Reed*, 404 U.S. 71 (1971), it is similarly wanting under Fourteenth Amendment due process.